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COMPTROLLER GENERAL OF THE UNITED STATES
Washington 25

October 19, 1951

B-105707

Commander J. H. Warner, SC, USN, Accountable Officer
Director, Special Payments Division
Bureau of Supplies and Accounts
Navy Department
Cleveland 14, Ohio

Dear Commander Warner:

Reference is made to your letter of September 13, 1951, file XH:D:53
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7624, requesting advice whether the retired pay of [REDACTED]
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[REDACTED], (retired) 7624, is subject to the provisions of section 212 of the Economy Act of 1932, because of his employment by the Central Intelligence Agency as a consultant on an intermittent basis.

Section 212 of the Economy Act approved June 30, 1932, 47 Stat. 406, as amended, codified as 5 U.S. Code 59a, provides:

"After June 30, 1932, no person holding a civilian office or position, appointive or elective, under the United States Government or the municipal government of the District of Columbia or under any corporation, the majority of the stock of which is owned by the United States, shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in any of the services mentioned in Title 37, at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than \$3,000; and when the retired pay amounts to or exceeds the rate of \$3,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. As used in this section, the term 'retired pay' shall be construed to include credits for all services that lawfully may enter into the computation thereof."

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25X1A9a The applicability of the above act is dependent on whether [REDACTED] is to be regarded as holding "a civilian office or position *** under the United States Government." In Office decision of January 17, 1947, Comp. Gen. 541, it was held that the employment of a retired officer on a fee basis as a consultant in an advisory capacity is not the holding of a civilian office or position" within the meaning of section 212 of said statute. However, in commenting on that decision in 28 Comp. Gen. 361, it was stated as follows:

"*** that holding was not intended as excepting from the provisions of the said section 212 of the Economy Act all retired officers merely because of their employment designation, for administrative purposes, as 'consultants' -- a title which necessarily implies the rendition of a certain amount of consultation services, comprising the expression of views and the giving of opinions and recommendations, but which does not necessarily limit the services to be rendered thereunder to such narrow confines. Rather, said holding was based upon the proposition that where the nature of the duties required is purely advisory, generally performed at infrequent intervals, and the compensation payable therefor is upon a fee basis, as distinguished from a purely time basis, the status of the employee is not such as would constitute the holding of an office or position within contemplation of section 212. ***"

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A copy of [REDACTED] contract of employment enclosed with your letter reveals that he was employed as an intermittent consultant "to consult with the National Estimates Board as a specialist in armed service (primarily naval) aspects of national intelligence estimates," and that his rate of compensation is fixed at \$50 per consultation.

It informally has been ascertained from the Central Intelligence Agency that the consultant services of [REDACTED] when called upon from time to time are purely advisory and rather infrequent. Also, that such consultations normally do not require more than one day but in the event they should extend over into the next day, the Admiral would only be entitled to one fee of \$50. Clearly, therefore, the

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employment of [REDACTED] is predicated upon a fee basis rather than a time basis and that factor together with other circumstances of his employment is not to be regarded as a "civilian office or position" within the meaning of section 212 of the Economy Act of 1932, supra.

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Accordingly, you are advised that [REDACTED] is entitled to his retired pay in addition to the fees received from his employment with the Central Intelligence Agency.

Sincerely yours,

Comptroller General
of the United States